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SAN FRANCISCO BAY CONSERVATION AND DEVELOPMENT COMMISSION
30 Van Ness Avenue, San Francisco 94102 557-3686

October 13, 1972

TO: All Commissioners and Alternates
FROM: Joseph E. Bodovitz, Executive Director

SUBJECT: EFFECT ON BCDC OF RECENT JUDICIAL INTERPRETATIONS OF THE CALIFORNIA ENVIRONMENTAL QUALITY ACT

1. Summary. California courts have recently rendered two major decisions interpreting the California Environmental Quality Act (CEQA) that will have important effects on the work of the Commission. As a consequence of these decisions, the Commission will now be responsible for the preparation of a detailed "environmental impact report" before issuing a permit for any project that "could have a significant effect on the environment." Moreover, the report must consider all the environmental consequences of each project, and not just those directly related to matters within the Commission's jurisdiction.

It appears that no environmental impact reports will be needed for "minor repairs or improvements," i.e., projects for which the Executive Director may issue a minor or administrative permit. But it also appears that the reports will be required for all other projects before a BCDC permit may be issued. To meet the requirements of the two decisions, some changes will obviously be needed in the Commission's permit procedures.

The decisions leave many questions unanswered, and almost all parties concerned agree that clarifying amendments to the CEQA are needed. The additional work that will be required by BCDC and its staff to comply with these decisions, particularly during the initial period of uncertainty, should not be underestimated. But the staff believes that the decisions do not place unnecessary or unwanted burdens on BCDC. Rather, the staff believes that the new interpretations of the CEQA are in line with the steps the Commission already takes in evaluating permit applications, and that the decisions offer the Commission expanded opportunities to achieve the goals of environmental protection combined with responsible development.

2. Background. The California Legislature passed the California Environmental Quality Act in 1970 in response to increasing public concern over environmental deterioration in California. Section 21100 of the CEQA provides that "state agencies, boards and commissions" are required to prepare a detailed environmental impact report on any "project they intend to carry out which could have a significant effect on the environment." The report must set forth the following information:

"(a) The environmental impact of the proposed action.

"(b) Any adverse environmental effects which cannot be avoided if the proposal is implemented.

"(c) Mitigation measures proposed to minimize the impact.

"(d) Alternatives to the proposed action.

"(e) The relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity."

The CEQA was enacted shortly after the National Environmental Policy Act (NEPA) was passed by Congress. The two acts have much in common: both require a written statement* describing the environmental impact of any governmental activity within the purview of the act, and both describe the required contents of the statements in almost identical language.

The major difference between the two acts is in the language that describes the governmental activities for which environmental impact reports or statements are required, and it is from this difference that the uncertainty over the scope of the CEQA arose. The NEPA uses the words "major federal actions" to describe the federal activities covered, while the CEQA refers to the "projects" [of state commissions] "they intend to carry out" to describe the state activities covered. This discrepancy raised the question of whether the two acts covered the same kinds of activities and specifically whether or not governmental regulatory (permit) activities (covered under the NEPA) were also covered under the CEQA. The latter, given the language used, was arguably limited to public works "projects." This was the issue decided by the Supreme Court in Friends of Mammoth v. Mono County, the first of the two recent decisions.

The second decision, Environmental Defense Fund, Inc. v. Coastside County Water District, dealt with two other important issues relating to the CEQA: (1) whether the agency responsible for the preparation of the statement can limit its inquiry just to environmental matters within its area of jurisdiction, and (2) whether the courts will supervise the adequacy of the reports, as they have under the NEPA.

3. Friends of Mammoth v. Mono County. This case arose out of a controversy over the issuance of building and conditional use permits for the construction of condominiums in the Mammoth Lakes area of Mono County. The construction was privately financed, and the only governmental act associated with the development was the issuance of the permits. The plaintiffs contended that an environmental impact report was required under the CEQA, while the defendants argued that the law applied only to public works projects and permits were thus excluded.

Relying heavily on the lengthy statement of legislative intent contained in the CEQA, the Supreme Court decided that a liberal interpretation of the law was mandatory. "Project" was therefore defined to include "private activities for which a government permit or other entitlement for use is necessary." The phrase "they intend to carry out," which modifies the word "project" in the law, was interpreted only to mean "that before an environmental impact report becomes required the government must have some minimal link with the activity, either by direct proprietary interest [e.g., public works] or by permitting, regulating, or funding private activity."

Although only local permits were involved in this case, the Supreme Court's interpretation of the word "project" as including permits means that permits issued by State agencies come under the CEQA. Hence the Commission will now be responsible for the preparation of environmental impact reports prior to the issuance of a permit for activities "which would have a significant impact on the environment of the state."

* Under the NEPA, the reports are called "environmental impact statements;" under the CEQA, they are called "environmental impact reports."

This latter phrase raises additional questions of interpretation that were not reached in the Friends of Mammoth decision. Anticipating these, however, the Court observed in a footnote that the term "significant effect:"

> may not be used lightly as a basis on which to excuse the making of impact reports. Instead, the term must be interpreted broadly to include those activities which have any non-trivial effect on the environment [emphasis added].

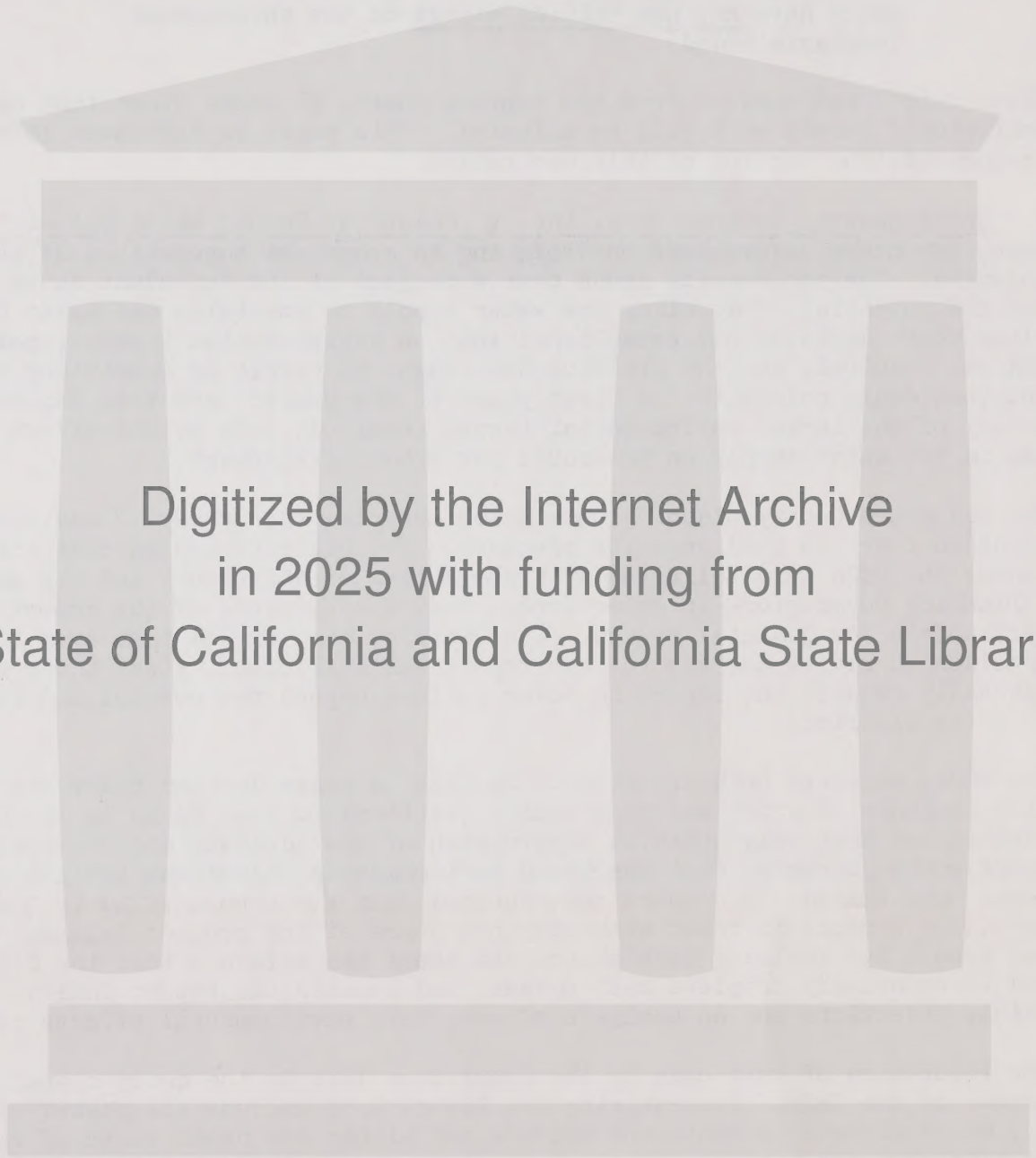
Given this broad mandate from the Supreme Court, it seems clear that much of the Commission's permit work will be affected. This point is discussed later in the staff recommendation section of this memorandum.

4. Environmental Defense Fund, Inc. v. Coastside County Water District. In this case, two other major questions relating to scope and supervision of the CEQA were answered. The controversy arose over a project of the defendant Water District that had the potential of doubling the water supply to coastside San Mateo County. An earlier court decision had established that an environmental impact report under the CEQA was required, and the District had sought to comply by submitting a brief document that dealt only with the first phase of the project and that failed to discuss any of the larger environmental issues involved, such as the effect of an increase in the water supply on pressures for urban development.

The San Mateo County Planning Commission accepted the "report," and the plaintiffs went to court to challenge its adequacy. The District argued that its obligations under the CEQA were fulfilled with the filing of the report and its acceptance by the Planning Commission--in other words, that the contents of the report were not a proper subject for judicial review. The District also argued that even if the court decided to review the report, the report was sufficient, since the court could not reasonably require the report to cover matters beyond the control and responsibility of the District.

The court rejected both arguments. Looking to cases decided under the Federal NEPA, the language of which was practically identical to that found in the CEQA, the court determined that only judicial supervision of the adequacy and thoroughness of the report would guarantee that the broad environmental objectives articulated in the CEQA would be attained. The court then decided that the report filed by the District was inadequate because it dealt with only one phase of the project, although the original report had included both phases and there was evidence that the District intended to eventually complete both phases, and because the report failed to include responsible objections and an analysis of secondary environmental effects of the project.

The importance of this case to the Commission lies in the court's analysis of the purpose of the CEQA. In requiring the District to include all phases of the project, major adverse comments and matters not within its usual scope of concern, such as increased pressure for development, the court indicated that the report is to be more than just a source of information on environmental consequences for decision-makers. Instead, it is also to operate as a "full-disclosure" device that will provide the general public with sufficient information to draw its own conclusions about the wisdom of the proposed project. For the Commission, this means that the reports will have to cover matters that the Commission had heretofore not considered within its permit jurisdiction, such as the impact of its decisions on land use patterns, air pollution, traffic congestion, esthetics, and so forth.



5. Unanswered Questions. As with many major court decisions, the two just described leave as many questions unanswered as answered. Moreover, the State Office of Planning and Research, which has the responsibility under the CEQA for issuing the guidelines relating to compliance by state and local agencies, has as yet not issued a final version. Consequently, many major uncertainties remain. Among these are the nature and extent of review and comment procedures within state and local government on environmental impact reports prepared in response to the Friends of Mammoth decision; whether the decision applies retroactively to projects approved before the decision; whether the CEQA applies to other actions having "a significant effect on the environment," such as plan amendments; whether the decision gives the Commission the power to deny permits for environmental reasons beyond its usual powers to do so under the McAteer-Petris Act; and the extent to which the Commission can delegate the duty of preparing the reports to prospective applicants.

6. Staff Recommendation. These two decisions present the Commission with at least one unique problem: By law, the Commission must act on permit applications within 90 days after they are filed, or permits are automatically granted. Thus, unlike some other governmental bodies, the Commission cannot delay action on valid permit applications until the uncertainties surrounding the two court decisions have been resolved.

The staff believes that new State guidelines for processing environmental impact reports will probably be prepared soon, and that new legislation to clarify the CEQA is also likely soon. Nevertheless, the staff believes that some interim action is needed now, and accordingly recommends that the Commission take the following steps at the October 19 Commission meeting:

a. Adopt the following as a temporary internal operating procedure: "No application for a permit shall be complete and therefore qualify for filing until the Executive Director determines either that the proposed project could not have a significant effect on the environment or that the prospective applicant has submitted sufficient information relating to the project to permit the preparation of an environmental impact report that meets the criteria set forth in Section 21100 of the Public Resources Code."

b. Direct the staff to take the steps necessary to permit the Commission to adopt the foregoing interim procedure as a formal regulation.

c. Direct the staff to develop procedures and regulations (1) for review and comment on environmental impact reports on projects proposed for Commission consideration; (2) for public review of such reports; (3) for the contents of such reports; and (4) for the consideration and adoption of such reports by the Commission.